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Supreme Court of the United States

October Term, 1946.

No. [redacted] 95

ALEXANDER WOOL COMBING COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

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ALEXANDER WOOL COMBING COMPANY,
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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Alexander Wool Combing Company respectfully shows as follows:

Summary Statement of the Matters Involved.

The matters involved arise under Section 403 of the Sixth Supplemental National Defense Appropriation Act, the Act of April 28, 1942 (Public Law 528, 77th Congress, 2nd Session) as amended by the Revenue Act of 1942, the Act of October 21, 1942 (Public Law 753, 77th Congress, 2nd Session). Subsection (e) added by the Revenue Act of 1943, the Act of February 25, 1944 (Public Law 235, 78th Congress, 2nd Session) is also applicable. Those statutes are hereinafter referred to as the Renegotiation Act or the Act.

The petitioner was the defendant and the respondent was the plaintiff in an action under the Act in the District Court of the United States for the District of Massachusetts in which judgment was entered for the plaintiff in the amount of $17,590.10 on June 21, 1946. The Circuit Court of Appeals for the First Circuit affirmed the judgment below on March 26, 1947, adopting the opinion of the District Court as grounds for its decision.

The complaint in the District Court alleged that after notice to the defendant, proceedings for the renegotiation of defendant's contracts and subcontracts were conducted by representatives of the Secretary of War, and that thereafter on September 6, 1944, the Under Secretary of War, acting under the Renegotiation Act, determined that of the profits realized by defendant on contracts and subcontracts subject to renegotiation in the fiscal years ended June 30, 1942 and June 30, 1943, $22,500 and $45,000 respectively, were excessive profits. The prayer for judgment was for these amounts less the tax credits allowable under I. R. C., Section 3806, which were alleged. The judgment was in accordance with the complaint.

The answer challenged the constitutionality of the Renegotiation Act as applied to the defendant on several grounds, and also the validity of the Under Secretary's determinations on the ground that they were made without due process.

Although the plaintiff made a motion for judgment on the pleadings and in the alternative for summary judgment upon the basis of certain affidavits, the District Court took evidence and decided the case "upon the basis of the papers * * * plus any testimony so far as legally relevant" (R. 19).

The evidence briefly summarized showed the following:

The defendant was in the business of combing grease wool into tops and noils on a commission basis. It did not enter into any contracts with a department as that word is used in the Act. It did not do work for others whom it knew to have contracts with a department, and none of the wool which it processed was designated or appropriated for any specific contract by another with a department at the time when the work was done. The defendant, however, knew that the tops and noils which it produced would flow in the course of commerce into the hands of persons performing government contracts, and that probably a substantial proportion would be used for that purpose.

The charges which the defendant made for its work were at fair market rates, competitive with those made by others in the same business, and frozen by the General Maximum Price Regulation issued by the Price Administrator at those prevailing in March, 1942 (R. 25, 232).

The Under Secretary's determinations that the defendant had realized excessive profits were not preceded by a fair hearing. No hearing was ever given before any person authorized to make a determination. At the conferences with representatives of the War Department to which defendant was invited, no issue was ever presented. Evidence as to sales, prices, and profits of other persons in the same business was considered but not disclosed to the petitioner. No standards to be applied to the facts found were disclosed, and it was represented that there were none. No findings other than the formal recitations in the Under Secretary's determinations were ever made (R. 235-236).

Reasons Relied on for the Allowance of the Writ.

Your petitioner is advised and alleges that the decision of the Circuit Court of Appeals was erroneous and should be reviewed by this Court, in that—

1. The decision is that the United States may impose a liability in the nature of a penalty upon the defendant merely by reason of the fact that products which it manufactured were ultimately used by others in the performance of contracts with a department.

2. The decision is that such a liability may be imposed retroactively, that is, that an Act of October 21, 1942 was applicable to profits realized prior to that date.

3. The decision is that the United States may appropriate profits realized on sales at fair market prices.

4. The decision is that Congress could delegate to the Secretaries of the departments the power to determine whether and in what amount a liability to the United States should be imposed without adequate standards to guide them.

5. The decision is that the Under Secretary could make an effective determination that the defendant had realized excessive profits without granting the defendant a fair hearing.

6. The decision is that in a suit brought upon the determinations of the Under Secretary, it is not a defense that they were made without due process.

7. The decision is that the privilege of a review of the Under Secretary's determinations in the Tax Court of the United States, granted by the Act of February 25, 1944, cures any defects in due process in proceedings under the Act of October 21, 1942.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the First Circuit, commanding that Court to certify and to send to this Court on a certain day to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 4205, *Alexander Wool Combing Company, Defendant, Appellant v. United States of America Plaintiff, Appellee,* to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

ALEXANDER WOOL COMBING COMPANY.
By its Attorney,
EDWARD C. PARK.

Supreme Court of the United States

October Term, 1946.

No.

ALEXANDER WOOL COMBING COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Court Below.

The opinion in the District Court for the District of Massachusetts is reported in *United States v. Alexander Wool Combing Company,* 66 Fed. Sup. 389, and is found at page 11 of the record. The opinion of the Circuit Court of Appeals for the First Circuit is not yet reported. It is found at page 241 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 26, 1947 (R. 241). Jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case and Specifications of Errors.

The summary statement of the matters involved in the case given in the petition contains in brief form all that is

material to the consideration of the questions presented other than the provisions of the statute challenged. The Renegotiation Act as originally enacted by the Act of April 28, 1942, and as amended by the Act of October 21, 1942, and Subsection (e) added by the Act of February 25, 1944, are set forth in an appendix. The statement of the reasons relied on for the allowance of the writ shows the errors intended to be urged. In the interest of brevity, they are not reiterated at this point.

Argument.

The writ prayed for should issue:

1. THE CONSTITUTIONAL QUESTIONS DECIDED ARE IMPORTANT AND HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The liability sought to be enforced is to pay to the United States a part of the just compensation received by the defendant for its work for others, which the Under Secretary has found to be an excessive profit. The liability is one not fixed when the work was done, but contingent upon the acts of such others, *i. e.*, their subsequent use of the defendant's products in the performance of government contracts. See the definitions in Subsection (a) as amended by the Act of October 21, 1942:

> "(4) The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.
>
> "(5) The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract . . . ."

The Secretaries charged with the administration of the Act have construed the word "required" as meaning "ultimately used".

May Congress impose such a liability and authorize an administrative agency to determine its existence and amount without any other guide than that supplied by the definition quoted? It seems important to know. If Congress may do so in wartime, may it not do so at other times? If Congress may do so, may not the legislatures of the states enact like statutes?

Is an administrative determination of an indebtedness to the United States made without a fair hearing entitled to greater force and effect than a judicial determination? The judgment of a court entered in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. Since the reason given is that the judgment is a nullity, we assume that it will be given no effect in the same jurisdiction, even though a right of appeal is not exercised. Does the doctrine of the finality of administrative orders where administrative remedies are not exhausted not only bar an application to a Court for equitable relief but require a Court to enforce it although shown that it was made without a fair hearing? Does the doctrine extend to a case where the order is not a mere regulation to be effective in the future but is judicial in its nature, a determination of a liability based upon specific evidence? Particularly, is the doctrine applicable to a determination under the Act of an amount "found as a result of renegotiation to represent excessive profits"?

We think these questions are involved in this case; that they are important; and ought to be settled by this Court. It is obvious that they are not adequately answered in the opinion of the District Court which the Circuit Court of Appeals adopted.

2. THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH THE PRINCIPLES LAID DOWN IN THE DECISIONS OF THIS COURT AND SUPPORTED BY THE GREAT WEIGHT OF AUTHORITY:

A. The liability imposed upon the defendant is for a penalty as a result of the acts of others and, therefore, its enforcement deprives the defendant of its property without due process of law.

The liability is not contractual in its nature. The defendant made no contracts with the United States. It did not voluntarily assume such a liability in its contracts with others.

The liability is not one for a tax.

The purpose of the Act was to prevent persons furnishing supplies or materials to the government for use in the prosecution of the war, or doing work in the manufacture of such supplies and materials, from realizing excessive profits out of that business. We concede that Congress might enact legislation within constitutional limits to accomplish such a purpose, and that the creation of an obligation to pay to the United States the amount of any excessive profits realized would be an appropriate sanction to effectuate the policy of such legislation.

It does not follow that such a liability may be imposed upon a seller merely because the article he sells is later resold to the United States.

Clearly the liability which the Act attempts to impose is in its nature a penalty. The power of Congress to create liabilities *in invitum*, other than for taxes, can only be incidental to some other power and as a means of compelling

obedience to its exercise. An appropriation of a part of the profits realized on transactions between private persons, merely because the subject matter of those transactions was later purchased by the United States, cannot accurately be regarded as a "recapture" of anything that ever belonged to the United States. See

United States v. McFarland, 15 F. 2nd 823, 838 (CCA-4), certiorari revoked 275 U. S. 485.
United States v. Smith, 39 F. 2nd 851, 858 (CCA-1).

To impose a penalty upon conduct, lawful when it occurs, by reason of subsequent events over which the person penalized has no control, seems plainly to deprive such person of property without due process of law.

Wickard v. Filburn, 317 U .S. 111.
Mulford v. Smith, 307 U. S. 38.

Even a tax on transactions completed prior to the date of the taxing statute has been held invalid as in violation of the Fifth Amendment.

Nichols v. Coolidge, 274 U. S. 531.
Untermyer v. Anderson, 276 U. S. 440.
Coolidge v. Long, 282 U. S. 582.

B. The liability imposed by the determination that the defendant realized excessive profits during its fiscal year ended June 30, 1942 is as a result of a retroactive application of the Act of October 21, 1942.

The defendant was not a "subcontractor" within any common law definition of that word.

MacEvoy v. United States, 322 U. S. 102.
Commissioner v. Aluminum Co., 142 F. 2nd 663 (CCA-3).

It is only if the definition introduced into the Act by the amendment of October 21, 1942 comprehends the defendant that it can be held liable, and then only if the words "required for the performance" are construed to mean "ultimately used for the performance" of a government contract.

Certainly the imposition of a penalty retroactively is without due process of law.

Forbes Pioneer Boat Line v. Board of Commissioners, 258 U. S. 338, 340.

C. The liability imposed, where as in this case it is for a part of the fair market price, effects an appropriation of private property for public use without just compensation.

The United States, of course, may not take private property for public use without just compensation.

Just compensation means fair market value.

United States v. Miller, 317 U. S. 369, 374.
United States v. New River Collieries, 262 U. S. 341, 344.
Davis v. Newton Coal Co., 267 U. S. 292, 301.

Just compensation may exceed cost plus a reasonable profit.

United States v. New River Collieries, supra.
L. Vogelstein & Co. v. United States, 262 U. S. 106.
Brooks-Scanlon Corp. v. United States, 265 U. S. 106.

Where the United States purchases goods at their fair market value, it cannot recapture a part of the price on the

ground that it constitutes an "excessive profit". It cannot recapture any part of the just compensation guaranteed to the purchaser without taking private property for public use without making just compensation.

The just compensation clause of the Fifth Amendment may not be evaded or impaired by any form of legislation.

Baltimore & O. R. Co. v. United States, 298 U. S. 349, 368.

The Renegotiation Act permits a finding that excessive profits have been realized on sales at fair market value. As it has been applied to the defendant it has resulted in determinations that excessive profits were realized on transactions in which defendant received only just compensation. The Act is, therefore, invalid.

D. The liability imposed is one determined by the Under Secretary without any adequate standard to guide him.

The definition of the term "excessive profits" as meaning "any amount of a contract or subcontract price found as a result of renegotiation to represent excessive profits", attempts to make the question whether excessive profits have been realized purely one of fact without regard to any rule or standard. The *arbitrium boni viri*, unrestrained and undirected, is made the test.

Apart from the express lack of any definition, the words "excessive profits" are not in themselves an adequate guide to administrative action. They are certainly not as precise and definite as the words "excessive prices", which were held to be so vague and indefinite in decisions under the Lever Act that no one could tell what they meant.

Small Co. v. American Sugar Ref. Co., 267 U. S. 233, 238.

United States v. L. Cohen Grocery Co., 255 U. S. 81, 89.

There is ample evidence in the debates in Congress that there was no intention to set up any standards to guide the Secretaries in their administration of the law. See *Renegotiation of War Contracts: Law, Debates and Other Legislative Materials*, compiled for the Use of the Committee on Ways and Means, by Barron K. Grier, Clerk, pp. 27, 89, 92, 95, 111, 117, 121, 138, 151, 154. See also a report of the Committee on Naval Affairs, House of Representatives, pursuant to House Resolution 30, House Report 733, 78th Congress, 1st Session, portions of which appear in the record of this case at pages 70-77.

E. The Under Secretary could not make an effective determination that the defendant had realized excessive profits without granting the defendant a fair hearing.

The determinations were made upon evidence not disclosed to the defendant and for that and other reasons without a fair hearing.

Ohio Bell Teleph. Co. v. Public Utilities Com., 301 U. S. 292, 300.

Morgan v. United States, 304 U. S. 1, 18.

Ordinarily, a fair hearing is a requisite to an administrative determination of liability.

Shields v. Utah Idaho Central R. Co., 305 U. S. 177, 182.

Interstate Commerce Com. v. Louisville & N. R. Co., 227 U. S. 88, 91.

The Act, as it existed before the amendment of February 25, 1944, granting the privilege of a review in the Tax Court of the United States, must be construed as requiring a fair hearing before any effective determination.

The right to a fair hearing before a Secretary before any determination of liability was not taken away in express language by the Act of February 25, 1944. It ought not to be found that it was taken away by implication. Renegotiation of contracts after they have been completed is not a situation in which administrative expediency requires a determination in advance of a hearing. The determinations themselves recite "hearings of which due notice was given" (R. 4, 6). The administrative agencies have themselves construed the law as requiring a fair hearing.

It is elemental that one aggrieved by an administrative determination of liability is entitled to judicial review of the question whether the determination was made with due process.

Morgan v. United States, 304 U. S. 1, 14, 15.
Radio Com. v. Nelson Bros. Co., 289 U. S. 266.
St. Joseph Stockyards Co. v. United States, 298 U. S. 38.
Crowell v. Benson, 285 U. S. 22.

F. The determinations of the Under Secretary were made without any findings of the basic and essential facts and are, therefore, invalid.

The determinations themselves contain no findings of fact (R. 4, 6). No statement of findings was ever furnished the defendant (R. 236).

Findings of the essential basic facts are a requirement of due process for an administrative determination of liability.

Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 202.
Panama Refining Co. v. Ryan, 293 U. S. 388, 431.
Saginaw Broadcasting Co. v. Federal Communications Com., 96 F. 2nd 554, 559, certiorari denied 305 U. S. 613.

It is submitted that where an administrative determination of liability lacks the findings required by due process of law, it should not be enforced by the Courts even though a right of administrative review has not been exhausted.

A court will not enforce the judgment of another court which appears on its face to have been made without due process, even though a right of judicial review has not been invoked.

Griffin v. Griffin, 327 U. S. 220, 228.
Baker v. Baker, Eccles & Co., 242 U. S. 394, 403.
Old Wayne Mut. L. Ins. Co. v. McDonough, 204 U. S. 1, 15.

We see no reasons why an administrative determination in the nature of a judicial judgment should be given any greater force and effect.

G. The failure of the defendant to seek a review in the Tax Court of the United States as it might have done under the Act of February 25, 1944, did not cure any defect in due process in proceedings under the Act of October 21, 1942.

The right of the United States to sue in the District Court was given in the statute as it existed prior to the Act of February 25, 1944. This suit was brought not under any provision of that Act, but under Subsection (c) (2) as found in the Act of October 21, 1942 which reads in part:

> "The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him, and not withheld or eliminated by some other method under this subsection."

Surely, this language when it was enacted and before any right of review was given in the Tax Court cannot have been intended to foreclose judicial inquiry into the propriety of the Secretary's determination, or, at least, into the question whether it had been reached by due process.

There is nothing in the Act of February 25, 1944 which limits the jurisdiction of a court in which a proceeding under the Act of October 21, 1942 is commenced. Indeed, the omission of any such limitation is significant since the Act of February 25, 1944 expressly provides with respect to the orders of the War Contracts Price Adjustment Board which it creates, in Subsection (c) (2):

> "In the absence of the filing of a petition with the Tax Court of the United States under the provisions of and within the time limit prescribed in Subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency."

It seems plain that Congress did not intend to restrict the jurisdiction previously given to the Courts with respect to the determination of a Secretary, but merely to give contractors and subcontractors an alternative remedy in the Tax Court.

Stark v. Wickard, 321 U. S. 288, 309, and cases cited.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the First Circuit and finally reverse it.

EDWARD C. PARK,
Counsel for Petitioner.

Appendix.

I

Sixth Supplemental National Defense Appropriation Act, 1942. The Act of April 28, 1942 (Public Law 528, 77th Congress, 2nd Session).

SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such con-

tract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts here-

tofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an

aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned. —

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstances is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

II.

Revenue Act of 1942. The Act of October 21, 1942 (Public Law 753, 77th Congress, 2nd Session)

TITLE VIII—RENEGOTIATION OF WAR CONTRACTS

SEC. 801. RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

SEC. 403. (a) For the purposes of this section....

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department * * *

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and (iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcon-

tractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiation shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion,

may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under

Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, (i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and (ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. With-

in one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation the Secretary of a Department may give the contractor or subcontractor written notice in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed $100,000 for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(b) Subsection (f) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended to read as follows:

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(c) Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

(i) (1) The provisions of this section shall not apply to—

(i) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural

deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

The Secretary may so exempt contracts and subcontracts both individually and by general classes or types.

(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person appointed

by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided*, That such person shall not prosecute any claim against the United States (1) which arises from any matter directly connected with which such person is employed, or (2) during the period such person is engaged in intermittent and temporary employment in a Department.

(d) The amendments made by this section shall be effective as of April 28, 1942.

Approved, October 21, 1942, 4:30 p. m.

III.

Subsection (e) of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, added by Revenue Act of 1943, the Act of February 25, 1944 (Public Law 235, 78th Congress, 2nd Session).

(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not

be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a

determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.